INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	7
Appendix	8

CITATIONS

Cases:	
Allen v. *Moe*, 39 F. Supp. 5 (Idaho)	5
Chapman v. *Home Ice Co.*, 43 F. Supp. 424 (W. D. Tenn.)	5
Collins v. *Hancock*, 4 Wage Hour Rept. 522 (D. La., Caddo Parish)	5
Divine v. *Levy*, 39 F. Supp. 44 (W. D. La.)	5
Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349	5
Fleming v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.)	5, 6
Fleming v. *Rex Oil & Gas Co.*, 43 F. Supp. 950 (W. D. Mich.)	5
Fleming v. *Schiff*, 5 Wage Hour Rept. 43 (D. Colo.)	5
Fleming v. *Valdivieso*, 5 Wage Hour Rept. 132 (D. P. R.)	5
Gordon v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980 (W. D. Ky.)	5, 6
Hamlet Ice Co. v. *Fleming*, 5 Wage Hour Rept. 295 (C. C. A. 4)	5, 6
Jewell Tea Company v. *Williams*, 118 F. (2d) 202 (C. C. A. 10)	6
Kirschbaum, A. B. v. *Walling*, Nos. 910, 924, this Term, decided June 1, 1942	5
Nelson v. *Southern Ice Co.*, 4 Wage Hour Rept. 562 (N. D. Tex.)	5
St. John v. *Brown*, 38 F. Supp. 385 (N. D. Tex.)	5
Sunshine Mining Co. v. *Carver*, 34 F. Supp. 274 (Idaho) and 41 F. Supp. 60 (Idaho)	5
United States v. *Darby*, 312 U. S. 100	4
Whigham v. *Tucker Oil Co.*, 4 Wage Hour Rept. 274 (N. D. Tex.)	5

464767—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. ——

ENTERPRISE BOX COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 16) is reported in 37 F. Supp. 331. The opinion of the Circuit Court of Appeals (R. 33) is reported in 125 F. (2d) 897.

JURISDICTION

The decree of the court below (R. 37) was entered on February 26, 1942. Petitioner's motion for rehearing (R. 41) was denied on March 24, 1942

(R. 44). The petition for a writ of certiorari was filed on June 1, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether petitioner's employees, engaged in the production of cigar boxes which are sold within the State to cigar manufacturers for filling within the State and distribution outside it are engaged in "production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

2. Whether the cigar boxes delivered within the State to cigar manufacturers for use as containers, constitute "goods" within the meaning of Section 3 (i) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set out in the Appendix.

STATEMENT

On May 27, 1940, the Administrator filed in the District Court a complaint against petitioner alleging that petitioner was violating Sections 15 (a) (1), (2), and (5) of the Fair Labor Standards Act and requested an injunction against continuance of such violations. The complaint alleged that petitioner's employees were engaged in "the production of goods for commerce" within the

meaning of Sections 6 and 7 of that Act but that petitioner had not complied with those Sections (R. 2–6). In its answer, petitioner conceded that it had not complied with the requirements of Sections 6 and 7 but asserted that its employees were not engaged in "the production of goods for commerce" and that the Act was not applicable to it (R. 6–9). The District Court found that petitioner was subject to the Act and issued the injunction prayed for (R. 9–26). The Circuit Court of Appeals affirmed (R. 33). The findings of the District Court, which are supported by the evidence and are not challenged by petitioner, may be briefly summarized as follows:

Petitioner's employees are engaged within the State of Florida in the manufacture of cigar boxes which petitioner thereafter sells and delivers to cigar manufacturers situated within the same State (R. 17). The purchasers of the boxes pack their cigars therein and sell and ship a substantial portion of their products thus packed in interstate commerce (R. 18). At the time the boxes are manufactured, petitioner knows and intends that the boxes will be shipped out of the State (R. 20–21).

ARGUMENT

1. While petitioner's contentions are by no means clear, it appears to assert (Pet. 8–9), as it did below, that the production in which its employees are engaged is not "production for commerce" because

the boxes produced are shipped out of Florida by someone other than petitioner. But

> * * * the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce * * *

United States v. *Darby,* 312 U. S. 100, 118. The language of the Act evinces no legislative intention to exempt the production of goods which are sold locally with the expectation or understanding that the purchasers will transport them in interstate commerce. Indeed, the definition of "goods" in Section 3 (i) to include "any part or ingredient thereof" plainly includes materials produced locally and locally incorporated by another manufacturer or processor into a product thereafter shipped in commerce. And Section 15 (a) (1), which makes it unlawful to ship, deliver, or sell "hot" goods "with knowledge that shipment or delivery or sale thereof in commerce is intended" becomes meaningless unless it has application to manufacturers in the category of petitioner.

The Circuit Court of Appeals for the Fourth Circuit, the only other Circuit Court to pass upon this question, has held that employees of an ice manufacturer who sells the ice within the state to railroad carriers for subsequent shipment to extra-state destinations, are engaged in "production for

commerce." *Hamlet Ice Co.* v. *Fleming,* 5 Wage Hour Rept. 295. And with one exception, all federal district court decisions are in accord with the decision of the court below.[1]

2. Petitioner contends (Pet. 3, 5–7) that the Act does not expressly apply to activities "affecting commerce." But insofar as the employees are engaged in "production of goods for interstate commerce" within the meaning of Sections 6 and 7 of the Act, the fact that the statute does not cover, in addition, activities "affecting commerce" is immaterial. *A. B. Kirschbaum* v. *Walling,* Nos. 910, 924, this Term, decided June 1, 1942. For this reason, *Federal Trade Commission* v. *Bunte Bros.,*

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[1] *Accord: Sunshine Mining Co.* v. *Carver,* 34 F. Supp. 274 (Idaho) and 41 F. Supp. 60 (Idaho) (ore sold to and refined by a local smelter into metals); *Fleming* v. *Valdivieso,* 5 Wage Hour Rept. 132 (D. P. R.) (raw sugar sold to and refined by a local refinery into edible sugar); *Allen* v. *Moe,* 39 F. Supp. 5 (Idaho) (lumber sold to a local manufacturer and transformed into matches); *Divine* v. *Levy,* 39 F. Supp. 44 (W. D. La.); *St. John* v. *Brown,* 38 F. Supp. 385 (N. D. Tex.); *Fleming* v. *Rex Oil & Gas Co.,* 43 F. Supp. 950 (W. D. Mich.); *Whigham* v. *Tucker Oil Co.,* 4 Wage Hour Rept. 274 (N. D. Tex.); *Collins* v. *Hancock,* 4 Wage Hour Rept. 522 (D. La., Caddo Parish); *Fleming* v. *Schiff,* 5 Wage Hour Rept. 43 (D. Colo.) (wrapping paper and other paper products sold to local florists); *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654 (N. D. Ga.); *Gordon* v. *Paducah Ice Mfg. Co.,* 41 F. Supp. 980 (W. D. Ky.); *Nelson* v. *Southern Ice Co.,* 4 Wage Hour Rept. 562 (N. D. Tex.) (all three cases concern ice sold locally to interstate rail carriers for use as refrigerant of foods and beverages). *Contra: Chapman* v. *Home Ice Co.,* 43 F. Supp. 424 (W. D. Tenn.), pending an appeal to the Sixth Circuit (same).

312 U. S. 349, upon which petitioner relies (Pet. 5), is not pertinent to the question presented.[2]

3. Petitioner's contention (Pet. 11–12) that the cigar boxes are not "goods" within the meaning of Section 3 (i) because the cigar manufacturers are "the ultimate consumers" of the boxes, ignores the specific requirement of Section 3 (i) that the products be already delivered to the ultimate consumer before they lose their character as "goods." Manifestly, even if the cigar manufacturers are ultimate consumers of the boxes, which is open to serious doubt, the fact that the boxes are not "goods" while in the possession of such manufacturers, does not relate back to destroy their character as "goods" at the time of their production. *Hamlet Ice Co.* v. *Fleming,* 5 Wage Hour Rept. 295 (C. C. A. 4); *Gordon* v. *Paducah Ice Mfg. Co.,* 41 F. Supp. 980 (W. D. Ky.); *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654 (N. D. Ga), pending on appeal to the Fifth Circuit.

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[2] *Jewell Tea Company* v. *Williams*, 118 F. (2d) 202 (C. C. A. 10), upon which petitioner relies (Pet. 4), does not concern the question whether petitioner's employees are engaged in "production of goods for commerce." The *Jewell Tea* case held that employees engaged in distribution within a State of goods brought into the State by their employer are not "in commerce" within the meaning of the Act.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States
Department of Labor.

JUNE 1942.